

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13091

Docket No. 12903

96-2-94-2-72

The Second Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

(Brotherhood Railway Carmen Division
(Transportation Communications International Union

PARTIES TO DISPUTE: (

(Southern Pacific Transportation Company (Eastern Lines)

STATEMENT OF CLAIM:

"DISPUTE: CLAIM OF EMPLOYEES:

1. That the Southern Pacific Transportation Company (Eastern Lines) violated the controlling Agreement, particularly Rule 34, when they arbitrarily and unjustly suspended Claimant Carman J. M. Silva for 10 days without pay on the basis of his alleged but unproven violation of Safety and General Rules for all Employees.
2. That accordingly, the Southern Pacific Transportation Company (Eastern Lines) be ordered to make Claimant whole for all time lost, and to remove from his personal record all matters pertaining to charges, investigation, and discipline issued."

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

As a result of a formal Investigation held on October 20, 1993, Claimant was notified that he was found guilty of failing to comply with cited safety rules and instructions which resulted in a personal injury to himself on September 21, 1993; he was assessed a ten working day suspension.

Claimant, a nineteen year employee, was regularly assigned as a Freight Carman on the 7:00 a.m. to 3:00 p.m. shift at Carrier's Englewood Yard in Houston, Texas. At approximately 9:30 a.m. on September 21, 1993 Claimant and his partner Ortega were disassembling a buckeye truck on track four when a sudden unexpected movement of the bolster occurred. Claimant injured his left hand ring finger when it was caught between the truck side frame and a clevis. He received medical attention and returned to the work site to complete his tour of duty.

The Carrier argues that the position of Claimant's hands on a pinch point at the time of the incident was improper and careless in violation of Rules 1007, 1101, 1102 and 3202 of the Safety and General Rules for All Employees. The rules read, in pertinent part, as follows:

"RULE 1007. CONDUCT: Employees will not be retained in service who are careless of the safety of themselves or others.

RULE 1101. SAFETY: Safety is of the first importance in the discharge of duty. Obedience to the rules is essential to safety and to remaining in service.

RULE 1102: PREVENTING INJURIES: Employees must exercise care to prevent injury to themselves or others. They must be alert and attentive at all times when performing their duties and plan their work to avoid injury.

RULE 2302: PROTECTION OF BODY PARTS: Do not place your hands, fingers, feet, legs or any part of your body in a position where they might be caught, pinched or crushed."

The Carrier relies upon a statement and photograph obtained from Claimant during a re-enactment of the incident indicating where he placed his hands. Claimant's initial testimony at the Investigation and the marking on the top of Claimant's left glove ring finger supports the Hearing Officer's conclusion that Claimant carelessly placed his finger in a pinch point.

The Organization argues that it was the unexpected movement of the bolster that caused the injury, not any failure to observe safety rules, relying upon the testimony of Claimant, Ortega and Division Mechanical Officer Bulanek who all agree that normal procedures were followed when Claimant disassembled the buckeye truck that day. The Organization points to the statements of Claimant's supervisors that he is an excellent, productive and safety-conscious employee, Claimant's injury-free record for over 12 years, and Claimant's explanation that he did not place his hands in the restricted area on the truck side despite the appearance of the bulky bandage over the side in the re-enactment photograph in contending that the discipline was unwarranted and excessive.

While this Board has held that negligence is grounds for disciplinary action, it has also required the Carrier to demonstrate by substantial evidence that Claimant's actions did not conform to the use of such care as would a reasonable and prudent person in order to sustain the discipline imposed. Second Division Award 11355. All witnesses testifying at the Investigation stated that normal procedures were followed by Claimant and his partner in disassembling the truck at the time of the injury. It is also undisputed that Claimant and Ortega discussed the safest way to perform the work before they started, and neither could have anticipated the movement of the truck bolster. The evidence relied upon by the Carrier to support its burden of proof is based primarily upon what occurred at the re-enactment, when the movement of the truck was anticipated and Claimant placed his hand on the truck side indicating where it had been earlier that day, but did not account for the overhang caused by the bandage until questioned about it at the Investigation. Under such circumstances, the mere fact that the injury occurred is insufficient substantial evidence to prove that Claimant placed his hand in an unsafe position or performed his job in a negligent manner in violation of any of the cited safety rules. We shall therefore require that the suspension be rescinded and expunged from Claimant's record, and that he be made whole for all time lost as a result.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 30th day of December 1996.